Supreme Court, U. S.
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No. 75-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

INTERNATIONAL HARVESTER COMPANY,

Petitioner,

VS.

ROBERT ANDERSON AND
AUTOMOBILE MECHANICS LOCAL NO. 701,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DATED: August 15, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

International Harvester Company ("Harvester") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. The judgment below invalidates, after trial and judgment on the merits, the consensual reference of a Title VII employment discrimination action to a United States Magistrate serving as a master in accordance with the provisions of the Civil Rights Act of 1964, as amended.

OPINIONS BELOW

The Court of Appeals entered an unpublished order (Appendix "A") reversing the judgment of the District Court and remanding the case for a new trial. The final

judgment of the District Court and the master's report adopted by the District Court are attached as Appendices "B" and "C", respectively. The sole authority cited for the Court of Appeals' order, *Flowers* v. *Crouch-Walker Corp.*, 507 F.2d 1378 (7 Cir. 1974), is reprinted for the Court's convenience as Appendix "D".

JURISDICTION

The Court of Appeals' order was entered on January 28, 1975, and Harvester's petition for rehearing was denied on April 17, 1975. On July 2, 1975, the time for filing this petition was extended to August 15, 1975. Jurisdiction exists under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

With the express consent of respondent who desired a prompt trial of his civil rights action, the District Court designated a United States Magistrate as a master to conduct an evidentiary hearing and submit a report on respondent's complaint against petitioner Harvester pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (f)(5). The subsequent master's report, which recommended findings in favor of petitioner, was reviewed and approved by the District Court. Respondent expressly consented before both the District Court and the Court of Appeals to the appointment of the Magistrate as a master. The Court of Appeals reversed and ordered a new trial solely on the ground that the reference to the Magistrate as a master was improper.

Two questions of significance are presented:

(1) Whether the District Courts are precluded from following the procedures authorized by Title VII and the Federal Magistrates Act for appointment of magistrates as masters to hear evidence and recommend decisions in Title VII actions?

(2) Whether a litigant who voluntarily consents to an evidentiary hearing on the merits of the case before a master thereby waives his right to have the evidence heard *de novo* by an Article III judge?

CONSTITUTION, STATUTES AND RULES

The statute most directly involved is Section 706(f)(5) of Title VII, Civil Rights Act of 1964, as added in 1972, 42 U.S.C. § 2000e-5(f)(5):

> "(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial *within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.*" (Emphasis added.)

Also relevant are: U.S. Const. art III, § 1; Federal Magistrates Act, § 101, 28 U.S.C. § 636(b); Fed. R. Civ. P. 53; and N.D. Ill. Magistrate Rule 1D(2)(b), (e), as amended, Rule 1.01. These additional texts are reproduced in Appendix "E".

STATEMENT OF THE CASE

Respondent Anderson brought this action on February 17, 1972, for alleged employment discrimination against petitioner Harvester and a union under Title VII of the Civil Rights Act of 1964. The case was assigned to District Court Judge Richard B. Austin on October 2, 1972.* (R. 29-30, 34.) On June 1, 1973,—or, 241 days after the

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* The delay in assigning the complaint to Judge Austin occurred as a result of a local practice by which Title VII complaints were initially assigned to magistrates. The initial assignment to a magistrate under this procedure, since discontinued, is not in issue in this case since it was superseded by the later assignment of the case to Judge Austin.

case was on Judge Austin's docket—Judge Austin designated Magistrate James Balog as a master to conduct a hearing on the merits and file a master's report pursuant to the authority conferred by Title VII.*

Harvester promptly moved to vacate Judge Austin's order of reference because of its concern over the possibility that the Court of Appeals would consider the reference a violation of Article III of the Constitution and thus eventually expose Harvester to two trials. (R. 57-58.)

Rather than supporting Harvester's objection to the appointment of a master, respondent vigorously insisted on an early hearing, expressly opposed Harvester's objection and consented to the reference in open court:

> "MR. GESAS [respondent's counsel]: . . . *I have no preference in regard to where this case is tried, however, I certainly am opposed to the principles that Harvester is attempting to enunciate here.* In this way you would vitiate every possibility of a Master's hearing and report.
>
> • • •
>
> "Now, this is a matter that has been referred to Magistrate Balog as a Master to hear and report, period. There is no finality to that decision, it is referred to you [Judge Austin], otherwise you vitiate every vehicle you have for this kind of reference." (Tr. of June 29, 1973, pp. 5, 9-10; emphasis added.)**

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* The June 1st order of reference provided:
"Since this case was not scheduled for trial within 120 days after issue was joined on July 7, 1972, pursuant to 42 U.S.C. § 2000e-5(f)(5) Magistrate Balog is hereby designated as a master to conduct a hearing on the merits of this case and thereafter to file a master's report in accordance with Federal Civil Rule 53." (R. 53.)

** Respondent's counsel also objected to waiting for trial before Judge Austin because respondent was not working and desired a prompt hearing. (Tr. of June 29, 1973, p. 11.)

After receiving respondent's concurrence that more than 120 days had elapsed, Judge Austin denied Harvester's motion to vacate the order of reference because the Title VII provisions permitting a reference to a master had been satisfied. (R. 59.)

After an evidentiary hearing on the merits, Magistrate Balog transmitted his master's report to Judge Austin in which he found in favor of Harvester and the co-defendant union and against respondent. (R. 67.) Although respondent objected to the master's report, respondent did not object to the reference to the master. Judge Austin reviewed and accepted the report and accordingly entered judgment for defendants. (R. 73-74.) On appeal, respondent still did not object to the order of reference to the master. To the contrary, respondent expressly informed the Court of Appeals during oral argument that he was in no way challenging the propriety of that reference.

Despite respondent's consent to the reference of his case to a master and his failure to raise such reference as an objection in the District Court or as an issue on appeal, the Court of Appeals reversed and remanded the District Court's judgment solely on the ground that the reference to a master was improper under its prior opinion in *Flowers* v. *Crouch-Walker Corp.*, 507 F.2d 1378 (7 Cir. 1974).* Consequently, Harvester is faced with the prospect of a retrial of this suit based solely on a procedural ground to which it had objected and to which respondent consented in both the trial and appellate courts.

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* The judgment below significantly broadens the holding in *Flowers* where a Title VII case was referred to a master before the requisite 120-day period on the District Court's docket had elapsed and without consulting the parties. (507 F.2d at 1379.) In this case, the 120-day period had elapsed and plaintiff thereafter expressly agreed to the reference under Title VII.

REASONS FOR GRANTING THE WRIT

The judgment below is unjust, but the reasons for granting certiorari possess significance which far surpasses the equities of this one suit.

This case presents important questions, to which there are conflicting answers causing confusion among the circuits, concerning the proper functioning of the federal magistrate system. The Court of Appeals' decision improperly restricts the use of magistrates in helping District Courts meet the burdens of their increasing caseloads and maintain the quality of justice. The decision below thus frustrates the congressional purposes underlying the Federal Magistrates Act of 1968 and the 1972 amendments to the Civil Rights Act of 1964. Accordingly, this case offers the Court an appropriate occasion for establishing clear guidelines regarding the use of magistrates in Title VII and other civil actions.

The writ also should issue because the judgment below squarely conflicts with other precedents holding that a party's consent to a reference to a master under Rule 53 is binding. The time of judges is too precious and the expense to the parties too great to allow federal court litigation to fall victim to a "heads, I win; tails, you lose" jurisprudence.

I. THE JUDGMENT BELOW PREVENTS THE FULL UTILIZATION OF FEDERAL MAGISTRATES, AS INTENDED BY CONGRESS, TO ASSIST DISTRICT COURTS IN PROMPTLY DECIDING TITLE VII ACTIONS.

Creation of federal magistrates in 1968 was a major effort, fostered by both the Judiciary and Congress, "to deal creatively with problems of delay and congestion generated by the exponential increase in the volume of federal litigation." *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 438 (S.D.N.Y. 1974). See Burger, C. J., "Report on the Federal Judicial Branch", 59 *A.B.A.J.* 1125, 1126

(1973). One important role given to magistrates in combating caseload congestion was service as masters under Rule 53, Fed. R. Civ. P., pursuant to local court rule. 28 U.S.C. § 636(b)(1). As a result, the contribution of magistrates has been considerable.*

A principal cause of the increased District Court caseload has been the rapidly growing number of civil rights actions.** In 1972, Congress re-examined Title VII and modified its provisions to give complainants easier and quicker access to the federal courts. See H. Rep. No. 92-238, *1972 U.S. Code Cong. & Admin. News* 2137, 2147-48; Sen. Rep. No. 92-415, Labor & Public Welfare Comm. at 23 (1971). Congress also recognized, however, that by facilitating the filing of federal court complaints for employment discrimination, it also was potentially adding to the acute congestion of District Court dockets and risking the substitution of judicial delay for administrative delay. See Sen. Rep. No. 92-415, *supra*, at 4, 17-18, 23. Consequently, the 1972 amendments to Title VII require the District Courts to expedite Title VII actions and to appoint a master in those cases which have not been scheduled for trial within 120 days after issue has been joined. 42 U.S.C. § 2000e-5(f)(4), (5). The plain purpose of these amendments was to provide Title VII complainants with a more prompt resolution of their claims. See *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1093 (6 Cir. 1974).

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* In fiscal year 1974 alone, magistrates disposed of 242,929 separate items of judicial business including the trial by consent of the defendant of 82,705 minor criminal offenses under 18 U.S.C. § 3401 and the submission of 367 master reports. *1974 Annual Report, Admin. Office U.S. Courts*, VI-2, 4 & 7.

** Federal "civil rights" suits (excluding prisoner applications) have increased in annual filings from 296 in fiscal 1961 to 2,453 in 1969, to 8,443 in 1974. The number of civil rights actions pending in fiscal 1974 was 20% greater than in 1973. In fact, 576 cases had pended for three or more years as of June 30, 1974. *1974 Annual Report, Admin. Office U.S. Courts*, IX-21, 30 & 32.

The judgment below squarely collides with the commendable purposes of both the Federal Magistrates Act and the Civil Rights Act of 1964. In this case, the District Court appointed a magistrate to serve as master with the consent of the plaintiff who wanted a prompt hearing on his Title VII complaint. The action had been pending on the District Judge's docket well over 120 days since issue had been joined so that the reference complied with the letter, as well as the spirit, of Title VII.

Without finding any error in the judgment on the merits, the Court of Appeals ordered a new trial solely because it considered the reference to a master improper. The apparent explanation of why the Court of Appeals would void such a patently valid reference to a master lies in its citation of *Flowers* v. *Crouch-Walker Corp.*, 507 F.2d 1378 (7 Cir. 1974). There, the Seventh Circuit held that the referral of a Title VII action to a magistrate as master *before* the elapse of 120 days on the District Judge's calendar and *without* consultation of the parties was improper where the case had been initially assigned to the magistrate by the Clerk of Court. The Seventh Circuit apparently considered as controlling the fact that this case also had been initially assigned to a magistrate. In doing so, the appellate court ignored* the facts that, on Harvester's initiative, the case was later assigned to District Judge Austin for more than the required 120 days and that Anderson expressly consented to the subsequent reference to the magistrate as master pursuant to Title VII.

The judgment below frustrates the policies of Congress and the Judiciary to utilize federal magistrates fully in managing trial dockets and particularly to facilitate the prompt resolution of Title VII claims. For this reason alone, the writ should issue.

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* Since Anderson had not raised the reference to a master as an issue on appeal, the validity of the reference was not even briefed to the Court of Appeals before it issued its order of reversal.

II. GRANTING THE WRIT IN THIS CASE WILL HELP RESOLVE EXISTING CONFUSION AND CONFLICT AMONG THE LOWER FEDERAL COURTS OVER THE PROPER FUNCTION OF MAGISTRATES.

The decision below is symptomatic of the confusion which now exists among lower federal courts over the proper role of magistrates. Since the decision in this case, the Northern District of Illinois has amended its local rules to preclude magistrates from serving as masters and hearing evidence in Title VII actions unless there exists an "exceptional" circumstance. N.D. Ill. Local Magistrates Rule 1.01(c)(1), (4); see Rule 53, Fed. R. Civ. P. This result is at war with the 1972 amendment of Title VII and the unquestioned use of magistrates as masters in Title VII cases in some other districts. See, e.g., *EEOC* v. *Hearst Corp.*, 10 EPD ¶ 10,246 (W.D. Wash., Sept. 24, 1974).

The federal courts themselves comment frequently on the conflicts that exist over the matters magistrates may hear as masters:

> "The courts in the several Circuits are divided on questions as to which kinds of matters properly may or should be confided to the magistrates either for decision or for recommended decision in the role of special master." *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 439 (S.D.N.Y. 1974).

See also *Knecht* v. *Gillman*, 488 F.2d 1136, 1137, n. 1 (8 Cir. 1973). Some decisions question or disapprove the reference of civil matters to magistrates. See *TPO, Inc.* v. *MacMillen*, 460 F.2d 348 (7 Cir. 1972) (magistrate cannot be assigned a motion for summary judgment); *Ingram* v. *Richardson*, 471 F.2d 1268 (6 Cir. 1972) (master cannot review determinations of Secretary of Health, Education and Welfare). In contrast, other courts have adopted a more expansive view of the role of magistrates. See *Weber* v. *Secretary, HEW*, 503 F.2d 1049 (9 Cir. 1974), *cert. granted sub nom.*,

Weinberger v. *Weber*, No. 74-850, 43 U.S.L.W. 3510 (Mar. 25, 1975);* *Givens* v. *W. T. Grant Co.*, 457 F.2d 612 (2 Cir. 1972) (magistrate may recommend dismissal of class action), *vacated on other grounds*, 409 U.S. 56 (1972); *Campbell* v. *U.S. District Court*, 501 F.2d 196 (9 Cir.) (magistrate may preside over hearing on motion to suppress exidence), *cert. denied*, 419 U.S. 879 (1974). Within circuits and even districts, confusion and divergent views exist over the proper use of magistrates. *Reed* v. *Board of Election Comms'rs*, 459 F.2d 121 (1 Cir. 1972); *Devcon Corp.* v. *Woodhill Chemical Sales Corp.*, 455 F.2d 830 (1 Cir.), *cert. denied*, 409 U.S. 845 (1972); *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 439 (S.D.N.Y. 1974).

One reason for the confusion and conflict among the circuits is the decision in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), which permits references to masters only under "exceptional circumstances." That decision, of course, preceded the significant upgrading of the former commissioner system through the Federal Magistrates Act and also antedates the declaration of Congress in 1972 that Title VII cases should be heard by a master after the passage of 120 days following joinder of issue. Therefore, one question presented is whether the conditions specified by the 1972 amendments to Title VII for reference to a master constitute an "exceptional circumstance" or whether the reference of a Title VII action must be additionally qualified by other considerations as suggested in the *LaBuy* decision.

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* The *Weinberger* v. *Weber* case, in which certiorari has been granted, concerns review by magistrates of administrative decisions whereas this case concerns their use as masters in civil actions. Taken together, resolution of the two cases by the Court would be of great assistance and benefit to the federal courts in clarifying the proper scope of the magistrate's role.

Until the existing confusion over the status of magistrates is resolved, the lower courts and litigants are exposed to needless risks of expense and delay in the final resolution of Title VII and other civil litigation. Absent prompt clarification of the magistrates' status, an important potential resource in the federal court system will lie fallow where it should be cultivated and will be abused where its use should be curtailed.

III. THE JUDGMENT BELOW INVALIDATING A CONSENSUAL REFERENCE TO A MASTER SHARPLY CONFLICTS WITH PAST PRECEDENTS AND THE FEDERAL MAGISTRATES ACT.

A third reason for granting certiorari is that the Court of Appeals' decision is in direct conflict with other precedents holding that a party's consent to proceeding before a master precludes his raising that ground as a basis for reversal. *Macri* v. *United States,* 353 F.2d 804 (9 Cir. 1965); *Mauro* v. *Rodriguez,* 135 F.2d 555 (1 Cir. 1943); *DeCosta* v. *Columbia Broadcasting System, Inc.,* 383 F. Supp. 326, 335, n. 17 (D.R.I. 1974); 5A Moore's *Federal Practice,* ¶ 53.05[3] (at 2962-63). See *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & Elec. Co.,* 245 F.2d 613 (8 Cir.), *cert. denied,* 355 U.S. 871 (1957).

In this case, Harvester objected to the order of reference primarily because of the uncertain status of magistrates and its desire to avoid two trials. Instead of joining in Harvester's objection, plaintiff opposed it and consented to the reference. The Court of Appeals' decision voiding the reference under these circumstances is indefensible and irreconcilable with these other decisions.

Moreover, the judgment below threatens to stunt the growing practice of referring matters to magistrates upon consent of the parties which the District Court could otherwise not refer over objection. See *United States* v. *Eastmount Shipping Corp.,* 62 F.R.D. 437, 439 (S.D.N.Y. 1974).

This practice is a commendable use of magistrates which should be sanctioned by the Court "as a means of reducing congestion in the district courts" instead of nullified as it has been by the decision below.* Comment, *"An Adjudicative Role For Federal Magistrates in Civil Cases,* 40 U. Chi. L. Rev. 584, 586 (1973).

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATE: August 15, 1975

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* In this connection, the judgment below casts doubt on the validity of convictions for minor offenses resulting from trials before magistrates pursuant to the defendants' consent. 18 U.S.C. § 3401(b); see *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 439 (S.D.N.Y. 1974). As noted, magistrates processed over 82,700 such trials in fiscal 1974 alone.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

ARGUED JANUARY 13, 1975

January 28, 1975

• • •

[Nos. 74-1255, 74-1256]

• • •

ORDER

On authority of *Flowers* v. *Crouch-Walker Corporation*, 7th Cir. No. 74-1163, decided December 18, 1974, the judgment is vacated; the case is returned to the Clerk of the district court with instructions to draw the case by lot for assignment to some judge of that court, so that he may proceed in accordance with the law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

• • •

[No. 72 C 424]

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JUDGMENT ORDER

The Court being duly advised in the premises, due notice having been given to all parties, and after review and careful consideration of all the evidence, documents and other materials, and after further consideration of plaintiff's objections to the Master's Report of Magistrate James T. Balog in this cause, it is ORDERED that:

1. The Master's Report in this cause including its findings of fact and conclusions of law is hereby accepted, adopted and affirmed pursuant to Rule 53 of the Federal Rules of Civil Procedure.

2. Judgment is hereby entered against the plaintiff Robert Anderson and for defendant International Harvester Company and for defendant Automobile Mechanics' Local No. 701.

3. This case is dismissed with prejudice.

R. B. AUSTIN
Judge
United States District Court

DEC. 19, 1973

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

• • •

[No. 72 C 424]

• • •

MASTER'S REPORT

To: The Honorable Richard B. Austin
Judge of the United States District Court,
For the Northern District of Illinois.

Honorable Sir:

On June 1, 1973 Your Honor entered an Order designating the undersigned United States Magistrate as a Master to conduct a hearing on the merits of this case and thereafter file a Master's Report. Transmitted herewith is a transcript of the hearing of September 11, 19[illegible] copies of Plaintiff's Exhibits 1, 2, 4, 4a, 5, 6, 7, 8, 9, 10, 11, 12, [illegible]2a, 15, 16, 17a, 17b and 18 and Defendant International Harvester's Exhibits 1, 4, 6a and 6b, and the final pretrial order which were admitted into evidence.

By his amended complaint, the Negro Plaintiff, Robert Anderson ("Plaintiff") brought a class action on his own behalf and on behalf of other Negro persons similarly situated who have been or are employed by defendant International Harvester Company ("Harvester") at its Truck

Sales and Service Center located at 611 West Roosevelt Road, Chicago, Illinois, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. (Amend. Compl., ¶¶ 2-3; Final PTO, p. 2.) Plaintiff and the class he represents allege that Harvester violated Title VII of the Civil Rights Act of 1964 by: discharging Plaintiff from employment because Plaintiff is a Negro; not permitting Plaintiff and other Negroes to work on diesel truck engines and other high classified jobs; assigning Negroes to grease jobs while assigning white employees to more desirable mechanical duties; requiring Negroes to work on a flat rate basis while white employees were accorded more satisfactory rates; and discriminating against Plaintiff because he had filed race discrimination charges against Harvester with the Equal Employment Opportunity Commission in September, 1970. (Amend. Compl., ¶ 8(a)-(g).) In addition, the amended complaint alleges that defendant Automobile Mechanics Local No. 701 ("Local 701") violated its duty of fair representation under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (Amend. Compl., ¶ 15.) The class action aspect of this case was not pursued by the Plaintiff. (Tr. 213, 214, 221, Final PTO.)

This Magistrate conducted the hearing of this cause on September 11, 1973. During the course of the hearing, this Magistrate heard evidence pertaining to all the issues raised by the amended complaint as set out in the agreed to final pretrial order. Plaintiff's witnesses included Plaintiff himself and other former Negro employees of Harvester who had been employed at Harvester's Roosevelt Road Sales and Service Center. Defendants presented evidence in rebuttal to all the issues through Harvester's former Service Manager at its Roosevelt Road facility and the Local 701 business representative. At the conclusion of the hearing and closing arguments, and after additionally considering Plaintiff's offer of proof through witness James Berry (see Tr. 223-225), this Magistrate found all of the issues against Plaintiff and in favor of defendants (Tr. 381-382) and makes the following Findings of Fact:

FINDINGS OF FACT

1. Plaintiff applied for employment as a mechanic at Harvester's Truck Sales and Service Center located at 611 West Roosevelt Road, Chicago, Illinois in October, 1968. (Tr. 9-10). Art Horn, the Service Manager at that time who is white, interviewed Plaintiff for the job and hired him as a utility mechanic. (Tr. 10, 12-14, 134.) Horn promised Plaintiff that he would promote him to the higher classification of journeyman mechanic if Plaintiff demonstrated he was capable of performing a journeyman's job. (Tr. 13.)

2. Plaintiff thereafter was employed at Harvester's Roosevelt Road facility from October 8, 1968, through April 23, 1971. (Tr. 10-11, 14.) Plaintiff worked as a utility mechanic for approximately 3 months and, after requesting Art Horn to promote him to journeyman mechanic, was promoted to journeyman mechanic. (Tr. 15, 19-20). During Plaintiff's employment with Harvester, he was a member of Local 701. (Tr. 125.)

3. Plaintiff requested Art Horn to train him for work on diesel engines and, consequently, Harvester sent Plaintiff at Harvester's expense to its diesel engine school located in Atlanta, Georgia, where Plaintiff learned to rebuild diesel injection pumps. (Tr. 41.) After his return from the Atlanta school, Plaintiff had an opportunity to work on diesel engine repairs. (Tr. 42.)

4. Among mechanics, journeymen received the highest rate of pay and apprentices received the lowest rate of pay. (Tr. 134-135.) Plaintiff received merit increases from time to time from Harvester's white service managers. (Tr. 157-158.)

5. Both black and white employees performed undercarriage truck grease jobs from time to time. (Tr. 158-159.)

6. A flat rate charge refers to a rate charged to a customer for repair work and is based upon the period of time

that a mechanic is expected to accomplish certain work. (Tr. 159, 298.) A time rate charge refers to a rate charged to a customer on an hourly basis for the amount of time that each mechanic spends upon a certain job. (Tr. 159, 298-299.) Whether a mechanic works under a flat rate or a time rate has no bearing upon a mechanic's rate of pay. (Tr. 159, 298-299.)

7. Plaintiff as well as other employees occasionally received the service manager's permission for additional time to finish work under a flat rate. (Tr. 159, 299.)

8. Peter Rapinchuk, the Service Manager who succeeded Art Horn, occasionally assigned Plaintiff to work on diesel engines. (Tr. 293.) However, Ted Thomas was the chief diesel engine mechanic on the first shift and, as of 1971, had approximately five years' diesel experience. (Tr. 294.) Walter Cooper, a black employee, was the chief diesel engine mechanic on the second shift who worked in the pump room on injection pumps and performed entire overhauls of diesel engines. (Tr. 290-291.)

9. Peter Rapinchuk was the Service Manager who succeeded Art Horn. Rapinchuk was employed at the Roosevelt Road facility from April, 1969, through July, 1972, when he supervised mechanics and allocated work among them. (Tr. 244-245.) He had authority to hire and fire mechanics. (Tr. 245.)

10. While Rapinchuk was employed at Roosevelt Road, he supervised 25-30 mechanics on three shifts. (Tr. 288.) Approximately eight of these mechanics were black employees. (Tr. 289.)

11. Rapinchuk interviewed all mechanics that he hired. (Tr. 289.) Of the 12 to 15 mechanics he hired, six or seven were black. (Tr. 290.)

12. The "five-day no-report rule" is an employment rule contained in the collective bargaining contract between Local 701 and Harvester. (PX 4A.) This rule provides

that an employee is subject to discharge if he is absent for five or more consecutive days without reporting the reason for his absence. (Tr. 175, 246.) Plaintiff was aware of this rule while he was employed by Harvester. (Tr. 175.)

13. Peter Rapinchuk terminated five mechanics, including Plaintiff, pursuant to the five-day no-report rule. (Tr. 246-252.) Three of these five mechanics were white; two of these white mechanics were journeyman mechanics. (*Id.*) The two white journeyman mechanics were, in Rapinchuk's opinion, more qualified than Plaintiff. (*Id.*) Each of the five mechanics was terminated in writing by Rapinchuk at the conclusion of the fifth consecutive day of his absence. (*Id.*) Rapinchuk discharged every employee under the five-day no-report rule who violated the rule. (Tr. 289.) The purpose of this rule was to enable Rapinchuk to control the work forces in order to maintain an economical work schedule by insuring that repairs could be handled expeditiously. (Tr. 246.)

14. In March, 1970, Plaintiff first injured his back while on the job. (Tr. 71.) Again in mid-January, 1971, Plaintiff re-injured his back on the job and returned to work in February, 1971.

15. On or about March 11, 1971, Plaintiff completed a "Request for Vacation" form on which he requested two weeks of vacation commencing the weeks of April 11 [*sic* 5] and April 18 [*sic* 12], 1971. (Tr. 261.) Plaintiff's vacation request was approved by Rapinchuk prior to March 15, 1971. (Tr. 261-262.) Thus Plaintiff's vacation period was to commence on Monday, April 5, and run consecutively through Friday, April 16. (*Id.*) As a result of Rapinchuk's approval of plaintiff's two-week vacation request, Rapinchuk signed a request for a vacation payroll check on March 15, 1971. (Tr. 170-171, 258-260; HX 6A, HX 6B.) Plaintiff later received his vacation check compensating him for two weeks of vacation. (Tr. 171.)

16. On the morning of March 25, 1971, Plaintiff notified Rapinchuk by telephone that he had a sore back and would be unable to come to work. (Tr. 267.) On that day, Anderson went to the South Chicago Community Hospital for treatment. (Tr. 79, PX 16.) Plaintiff thereafter consulted Dr. Ujiki, a Harvester-retained physician, in his office on April 2, 1971. (Tr. 84, 178, 278.) From March 25, 1971, until April 26, 1971, Rapinchuk did not talk with Plaintiff with the exception of a "hello" during one of Plaintiff's visits to the Roosevelt Road facility prior to April 5. (Tr. 268, 281-282.)

17. During March and April, 1971, Plaintiff visited his own independent physician, Dr. J. M. Vargas, for back treatment from time to time. (Tr. 83-86.) On Thursday, April 22, 1971, Dr. Vargas gave to Plaintiff a document (PX 11) which purportedly released Plaintiff to return to work on April 26, 1971. (PX 11; Tr. 87-89.)

18. Plaintiff applied for and received disability pay from Harvester for the period March 25 through April 5 but he did not receive any disability pay for any period thereafter. (Tr. 86, 208-209.)

19. During the period March 25 through April 26, 1971, Plaintiff did not inform anyone at Harvester to cancel his vacation or to hold his vacation check. (Tr. 174-175.) However, Anderson conferred with Ralph Wilson, Harvester's Roosevelt Road accountant, in Wilson's office during early April, 1971. (Tr. 182.)

20. On or about April 8, 1971, Rapinchuk attended a meeting with Ralph Wilson and Al Victor, the Branch Manager at the Roosevelt Road facility. (Tr. 274-275.) At that meeting Wilson showed to Rapinchuk Plaintiff's Claim for Disability Benefits form (HX 4) signed by Plaintiff on April 2, 1971. (See HX 4; Tr. 274-275.) Wilson stated that "it appears that [Plaintiff] has been released by his doctor and is able to go back to work." (Tr. 275.) Wilson also informed Rapinchuk at that meeting that Plain-

tiff had asked him for his vacation check and that Wilson indicated that he would take steps to get it. (Tr. 276.) Wilson also informed Rapinchuk that he had talked to Dr. Ujiki and had been informed by Dr. Ujiki that on April 2 he [Dr. Ujiki] had instructed Plaintiff to return to work. (Tr. 278.)

21. Based upon Rapinchuk's April 8 meeting with Ralph Wilson and Al Victor, and Rapinchuk's own examination of HX 4, Rapinchuk reasonably believed that Plaintiff was no longer disabled, that Plaintiff had commenced his vacation on April 5, and that he was ready to return to work after his requested two-week vacation. (Tr. 279-280.)

22. By the end of the work day on April 23, 1971, Rapinchuk had not heard from Plaintiff nor had Plaintiff reported to work since prior to March 25. (Tr. 281.) Friday, April 23, was five working days after the conclusion of Plaintiff's vacation period which had commenced on April 5. (Tr. 281-282.) Plaintiff therefore had violated the five-day no-report rule by failing to report to work within five consecutive working days after the conclusion of his vacation period or report the reason for his absence. Accordingly, Rapinchuk wrote Plaintiff a letter of employment termination dated April 23, 1971, (PX 4A) at the conclusion of Plaintiff's shift on April 23. (Tr. 281-282; PX 4A.) This letter informed Plaintiff that his employment had been terminated pursuant to the five-day no-report rule. (*Id.*) Before Rapinchuk sent the letter of termination to Plaintiff, he showed it to Ralph Wilson, Al Victor and Ted Thomas, the steward of Local 701; none of them objected to it. (Tr. 283-284.)

23. On the morning of Monday, April 26, 1971, Plaintiff called Rapinchuk and informed him that he would be late for work because he had car trouble. (Tr. 270.) Rapinchuk then informed Plaintiff that he had been terminated for violating the five-day no-report rule. (Tr. 270.)

24. Shortly after April 26, 1971, a meeting was held among Plaintiff, Harvester management and a Local 701

representative. (Tr. 283-284.) Plaintiff requested to be reinstated but he was informed by Harvester management that he had violated the five-day no-report rule. (Tr. 285-286.) Under the terms of the union agreement, Harvester did not rescind the termination of April 23. (Tr. 285-286.)

25. On or about May 7, 1971, Plaintiff obtained from Dr. Vargas a second statement of Claim for Disability Benefits (PX 5) signed by Plaintiff on May 7, 1971. (Tr. 97; PX 5.) Plaintiff delivered this form to Harvester's accountant and branch manager. (Tr. 98.)

26. Sometime subsequent to May 7, Harvester management advised Oren Jorstad, the Business Manager of Local 701, that Harvester was going to "stand on the company doctor's release of Mr. Anderson to return to work" which had been given prior to Plaintiff's vacation period. (Tr. 347-348.)

27. Harvester's discharge of Plaintiff from employment on April 23, 1971, as a result of Plaintiff's violation of the five-day no-report rule was based solely upon non-racial grounds. Likewise, Harvester's subsequent affirmance of Plaintiff's termination was based upon non-racial grounds.

CONDUCT OF LOCAL 701
(See Generally Tr. 325-360)

28. Shortly after Plaintiff was informed by Rapinchuk of his discharge, he contacted Jorstad. Jorstad thereupon promptly inquired of and was informed by Rapinchuk that Plaintiff had been terminated for violating the five-day no-report rule.

29. Shortly after April 26, 1971, a meeting was held among Plaintiff, Harvester management and Jorstad. At the meeting, Jorstad requested that Plaintiff be re-instated but Harvester declined.

30. Local 701 fully investigated Plaintiff's request for job re-instatment. In an unsuccessful attempt to attain re-instatment for Plaintiff, Jorstad contacted Harvester management on numerous occasions and consulted the Plaintiff.

31. Local 701 did not control the hiring, transferring, shift assignment, work assignment or promotion of Harvester employees.

32. After Plaintiff's discharge, Local 701 continually attempted to place Plaintiff in other positions and recommended other employers for Plaintiff to contact.

33. Plaintiff's race was not a factor and did not bear upon Local 701's handling of Plaintiff's request for job re-instatement and Local 701 fairly represented Plaintiff.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the subject matter and the parties hereto.

2. Defendant International Harvester Company did not violate Title VII of the Civil Rights Act of 1964 in the discharging of Plaintiff from Defendant's employment.

3. Defendant Automobile Mechanics Local 701 did not violate Title VII of the Civil Rights Act of 1964 or its duty of fair representation under the National Labor Relations Act as alleged in the Amended Complaint.

4. That a judgment should be entered for Defendants and against Plaintiff and this action be dismissed.

Respectfully submitted,

JAMES T. BALOG
James T. Balog

United States Magistrate

DATED: November 7, 1973

APPENDIX D

ROBERT FLOWERS,
Plaintiff-Appellant,
v.
CROUCH-WALKER CORPORATION,
Defendant-Appellee.

No. 74—1163.

[Reported at 507 F.2d 1378 (7 Cir. 1974)]

PER CURIAM.

This is an appeal from a judgment for the defendant entered by the United States District Court for the Northern District of Illinois upon a complaint alleging a violation of Title VII of the United States Civil Rights Act of 1964 (42 U.S.C. § 2000e) as well as a violation of the United States Civil Rights Act of 1866 (42 U.S.C. § 1981). The principal point which requires our consideration is whether the manner in which this case was referred by the district court to a magistrate pursuant to its Local Magistrates Rule 1, subd. D(2)(b)(i) was permissible in view of specific provisions of the Civil Rights Act of 1964, general standards appropriate for the trial of cases in the United States District Court, the inhibitions of Article III of the United States Constitution, and the due process clause of the Fifth Amendment to the United States Constitution.

In view of what is the dominant issue before us, we may be brief with respect to the description of the allegations in the complaint which was filed on September 15, 1972.

Plaintiff alleged that defendant violated the two statutes already cited by discharging him on account of his race from a job at the Standard Oil Building in Chicago in February 1972.

When the case was filed in the district court, which ordinarily, under its General Rule 10, in the generality of cases provides for an immediate assignment of a newly-filed case to a particular judge, the clerk instead assigned it immediately to Magistrate Jurco. This assignment was in accord with the special provisions of the court's Magistrates Rules governing actions brought under Title VII, Subchapter VI, of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), as those provisions are interpreted and applied by the court. The full text of the relevant magistrates rule to which reference has just been made follows.

Local Magistrates Rule 1, subd. D(2)(b) provides:

> D. Pursuant to Section 636(b), Title 28, United States Code, each full-time magistrate is assigned and shall perform the following additional duties anywhere in this district and for those purposes is hereby granted the following plenary powers:
>
> • • •
>
> (2) Civil Proceedings.
>
> • • •
>
> (b) To consider all motions and, where appropriate, [prepare] findings of fact and proposed conclusions of law in the following non-jury matters:
>
> (i) Actions brought under Title VII, Subchapter VI, 42 U.S.C. § 2000e, *et seq.*, for discrimination in equal employment opportunity;

Magistrate Jurco conducted pre-trial conferences, supervised discovery, and received status reports. When on February 1, 1973 discovery had largely been completed, the clerk assigned the case to District Judge McLaren. On February 12, Judge McLaren referred the case back to Magistrate Jurco to hold further conferences and prepare a final pre-trial order. After having held a pre-trial conference on April 13, 1973 and approved a pre-trial order on April 19, 1973, she returned the case to Judge McLaren to

be set for trial. On May 7, 1973 Judge McLaren, using a standard form and without purporting in any way to exercise a discriminating judgment with respect to this particular case or its relation to his total docket, entered the following order without advance notice to the parties or hearing and without requesting of them whether they would prefer to wait beyond June 7, 1973 rather than to have the case tried by a magistrate:

> This matter has been assigned to this Court since February 7, 1973 but cannot be scheduled for trial by June 7, 1973 owing to the priority required to be accorded to criminal cases. Accordingly, pursuant to 42 U.S.C. § 2000e—5(f)(5), this cause is hereby referred to United States Magistrate Olga Jurco as a master for the preparation of a report, including findings of fact and conclusions of law. Fed.R. Civ.P. 53.

Magistrate Jurco held a trial June 26, 1973, and received testimony of witnesses whose stories conflicted and whose credibility was necessarily drawn into dispute. Believing defendant's witnesses, Magistrate Jurco prepared a report and recommendation that the complaint should be dismissed because plaintiff was laid off not for racial reasons but because of poor work.

Plaintiff filed objections to the Magistrate's report, and they, together with the record, were received by Judge McLaren. He did not conduct any hearing, nor did he ever see the witnesses whose credibility was in dispute. On November 29, 1973, he issued findings and conclusions upholding Magistrate Jurco's report in all essential respects and entered judgment for the defendant.

[1] We start with the undoubted proposition that there is no constitutional provision, no specific statute, and no rule approved by the Supreme Court of the United States, or indeed by this court, which authorizes the assignment of cases by clerks of court to magistrates. There are, of course, provisions for assignment to magistrates by judges.

Next, we note that there is in Rule 53 of the Federal Rules of Civil Procedure the clear statement that "a reference to a master shall be the exception and not the rule . . . [and] shall be made only upon the showing that some exceptional condition requires it." Without pausing for additional citations, it will be sufficient to refer to a celebrated case coming from this circuit in which the Supreme Court added sinew to the rule. LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). See also In re Irving-Austin Building Corporation, 100 F.2d 574 (7th Cir. 1938); Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809 (7th Cir. 1942).

Beyond the generally applicable standards governing assignment of cases to magistrates, we now turn to the specific provisions in Title VII of the Civil Rights Act of 1964, more particularly § 706(f)(4) and (5) (42 U.S.C. § 2000e-5(f)(4) and (5)), which provide:

> § 706(f)(4). It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge), who shall then designate a district or circuit judge of the circuit to hear and determine the case.
>
> § 706(f)(5). It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If the judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

[2] Against the background just cited, we think it plain that, as here applied, and indeed apparently as applied under all cases brought under the Civil Rights Act of 1964, Rule 1, subd. D(2)(b)(i) of the Local Magistrates Rules adopted by the United States District Court for the Northern District of Illinois is invalid because it is so plainly repugnant to the letter and the spirit of § 706(f)(4) and (5) of the Civil Rights Act of 1964.

In language that is unmistakably clear, Congress has imposed upon the judges of the court themselves the duty to assign cases under the Civil Rights Act of 1964. It has indicated a preference to have the case heard by a judge, and has authorized the appointment of a master to hear such a case only when a particular judge has determined that that specific case cannot be heard within 120 days after issue has been joined.

Inasmuch as the rule adopted by the Northern District of Illinois flouts the statute, we find it unnecessary to consider the broader questions: whether the principle of the *LaBuy* case interpreting Rule 53 of the Federal Rules of Civil Procedure, or the radiations of Article III of the United States Constitution, or the restraints of the due process clause of the Fifth Amendment to the United States Constitution would also condemn the local rule.

We, of course, recognize that in following the local rule, Judge McLaren deferred to his brethren's action and is subject to no personal criticism for the way he made the reference or conducted this case. Indeed, he painstakingly went over the formal record and made his own findings and conclusions, even though he did not see the witnesses *ore tenus*.

In accordance with the foregoing, the judgment is vacated; the case is returned to the Clerk of the district court with instructions to draw the case by lot for assignment to some judge of that court, so that he may proceed in accordance with the law.

APPENDIX E

CONSTITUTION, STATUTES AND RULES

1. **United States Constitution,** Art. III, § 1:

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. **Federal Magistrates Act,** § 101, 28 U.S.C., § 636(b):

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge

having jurisdiction over the case as to whether there should be a hearing.

3. **Title VII of the 1964 Civil Rights Act,** §§ 706(f)(4), (5) (as added in 1972), 42 U.S.C. § 2000e-5(f)(4), (5):

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

4. **Federal Rule of Civil Procedure** 53(b), (c), (e)(1)(2):

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or per-

form particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

• • •

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days

after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

5. **Northern District of Illinois Local Magistrate Rule** 1(D)(2)(b)(i), (e):*

D. Pursuant to Section 636 (b), Title 28, United States Code, each full-time magistrate is assigned and

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* This rule was in effect until March 10, 1975. The current local rule provides in pertinent part as follows:

"Rule 1.01 Duties and Powers of Magistrates

A. *General.* U.S. Magistrates for the Northern District of Illinois are authorized to exercise all powers and perform all duties now or hereafter authorized by the Constitution and laws of the U.S., applicable Federal Rules of Civil and Criminal Procedure, local rule, order or regulation.

• • •

C. *Civil Cases.* Without limiting the general grant of authority in paragraph 1.01A above, the U.S. Magistrates in this district are authorized to perform the following duties in civil case;

(1) Upon reference by a judge of this court, serve as a special master in appropriate actions pursuant to the applicable provisions of Title 28, U.S. Code, and Rule 53 of the Federal Rules of Civil Procedure.

• • •

(4) Upon reference by a judge of this court, assist the judge in the preliminary review and pretrial and prehearing processing of habeas corpus and civil rights petitions . . . and submission to the judge of a written report regarding the necessity for an evidentiary hearing or trial which report may include suggested findings of fact and conclusions of law if the magistrate reports that an evidentiary hearing is not required."

shall perform the following additional duties anywhere in this district and for those purposes is hereby granted the following plenary powers:

• • •

(2) Civil Proceedings.

• • •

(b) To consider all motions and, where appropriate, to suggest proposed findings of fact and proposed conclusions of law in the following non-jury matters:

(i) Actions brought under Title VII, Subchapter VI, 42 U.S.C. § 2000e, et seq., for discrimination in equal employment opportunity:

• • •

(e) To serve as special master under Rule 53 (b) F.R.Civ.P. in appropriate civil actions.